

Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act's Capacity-Based Model

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ABSTRACT: This Article considers the gaps and obstacles in current law faced by the pregnant woman whose job duties may conflict with pregnancy's physical effects. While there is no inherent conflict between pregnancy and work, women in physically strenuous or hazardous occupations, from nursing to law enforcement, routinely confront situations in which they are physically unable to perform aspects of their job or, though physically able, seek to avoid certain tasks because of the potential risks to maternal or fetal health. The Pregnancy Discrimination Act of 1978 (PDA) broadly protects against pregnancy discrimination, but it provides absolute rights only to the extent a pregnant woman is able to work at full capacity, uninterrupted by pregnancy's physical effects. To the extent that the law grants affirmative rights to the pregnant worker with temporary physical limitations, such as the right to workplace accommodation, it is only on a comparative basis—that is, only to the extent those rights already are provided to similarly situated temporarily disabled employees. In this way, pregnancy continues to inhibit equal employment opportunity for millions of women, three decades after the PDA's passage.

After briefly examining the medical literature documenting the conflicts between pregnancy and certain kinds of work, as well as the law as applied to pregnant workers who are fully capable or fully incapable due to the effects of pregnancy or childbirth, we consider the predicament of women in physically demanding fields whose work capacity is partially diminished by pregnancy. We focus here on the problem of access to light-duty work—temporary alternative job assignments that accommodate the pregnant worker's limitations. Without such accommodation, the pregnant firefighter or home

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health care aide whose doctor directs her to avoid heavy lifting or other tasks is faced with a Hobson's choice: ignore medical advice and continue to perform all job duties, or stop working altogether, usually sacrificing wages and other benefits for several months. We describe the limits of the existing PDA framework for protecting these pregnant workers, and suggest litigation strategies for maximizing pregnant workers' rights under current law. These include reframing the "similarly situated" analysis for disparate treatment challenges to light-duty policies, and exploring the untapped potential of the disparate impact theory in the light-duty context.

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INTRODUCTION

Though sometimes considered a thing of the past, the inequality faced by pregnant workers continues to warrant attention. Women make up nearly half of the workforce, and eighty-five percent of working women will become mothers at some point during their working lives.¹ Women also work longer while pregnant and return to work sooner after childbirth than ever before.² Yet many workplaces remain difficult for pregnant workers to navigate.

1. See SHEILA B. KAMERMAN, ALFRED J. KAHN & PAUL KINGSTON, MATERNITY POLICIES AND WORKING WOMEN 5, 7 (1983); U.S. Dep't of Labor, Quick Stats 2007, www.dol.gov/wb/stats/main.htm (reporting that women accounted for forty-six percent of the total labor force in 2007).

2. KRISTIN SMITH, BARBARA DOWNS & MARTIN O'CONNELL, U.S. CENSUS BUREAU, MATERNITY LEAVE AND EMPLOYMENT PATTERNS: 1961-1995, at 19 (2001), available at <http://www.census.gov/prod/2001pubs/p70-79.pdf>.

Pregnancy discrimination claims have been rising at a faster rate in the last ten years than other types of discrimination claims.³ The rise in claims—and the millions of dollars paid out in response⁴—suggests the persistence of unlawful treatment of pregnant women at work. Though pregnancy discrimination became illegal more than three decades ago, employers continue to indulge “biases about both the abilities of pregnant women and their proper roles in the workplace and in the home.”⁵ The EEOC’s current pregnancy discrimination lawsuit against financial services and media giant Bloomberg L.P., which at least fifty-eight women have joined as plaintiffs,⁶ is a vivid illustration of bias persisting at the highest echelons. A report that the nation’s largest maternity-clothes retailer settled a charge of refusing to hire pregnant applicants for \$375,000 is equally telling.⁷

As important as the persistence of unlawful discrimination, however, are the gaps in current law faced by the pregnant woman whose job duties may conflict with the physical effects of pregnancy. How should the law account for a pregnant woman who is healthy and eager to work, but in need of accommodations because she is temporarily unable to perform her job at full capacity? Pregnant workers routinely confront situations in which they are physically unable to perform aspects of their job or, though physically able, seek to avoid risks to maternal or fetal health. These conflicts have steadily increased as women have entered the workforce in large numbers, and even more so as they have sought to enter physically strenuous or hazardous jobs traditionally reserved for men.

Under the Pregnancy Discrimination Act of 1978 (PDA),⁸ rights are granted or withheld based primarily on a pregnant woman’s capacity to work.

3. The EEOC reports a forty percent increase in charges related to pregnancy between 1997 and 2007, on top of a ten percent increase between 1992 and 1996. *See* EEOC, Pregnancy Discrimination Charges: EEOC & FEPAs Combined: FY 1997-FY 2007 (Feb. 26, 2008), <http://eeoc.gov/stats/pregnanc.html> [hereinafter EEOC, FY 1997-FY 2007]; EEOC, Pregnancy Discrimination Charges: EEOC & FEPAs Combined: FY 1992-FY 1996 (Jan. 31, 2007), <http://eeoc.gov/stats/pregnanc-a.html>.

4. Monetary benefits paid out annually through EEOC conciliations (not including litigation) increased dramatically in the last decade, from \$5.6 to a whopping \$30 million between 1997 and 2007. EEOC, FY 1997-FY 2007, *supra* note 3.

5. NAT’L P’SHP FOR WOMEN & FAMILIES, THE PREGNANCY DISCRIMINATION ACT: WHERE WE STAND 30 YEARS LATER 10 (2008), available at http://www.nationalpartnership.org/site/DocServer/Pregnancy_Discrimination_Act_-_Where_We_Stand_30_Years_L.pdf (“What is striking is how frequently cases involve straightforward violations of the [law] that seem to be fueled by a fundamental resistance to having pregnant women in the workplace, or having to accommodate the needs of pregnant women.”).

6. Alan Feuer, *54 More Women Accuse Bloomberg Firm of Bias*, N.Y. TIMES, May 2, 2008, at B1; Press Release, EEOC, Bloomberg L.P. Sued for Pregnancy Bias (Sept. 27, 2007), <http://www.eeoc.gov/press/9-27-07.html>.

7. Press Release, EEOC, Maternity Store Giant To Pay \$375,000 To Settle EEOC Pregnancy Discrimination and Retaliation Lawsuit (Jan. 8, 2007), <http://www.eeoc.gov/press/1-8-07.html>.

8. 42 U.S.C. § 2000e(k) (2000). As an amendment to Title VII of the Civil Rights Act of 1964, the PDA only protects women who work for employers with at least fifteen employees. *See id.* § 2000e(b).

The law broadly protects against “pregnancy discrimination,” in that it does not generally permit employers to take adverse action against a woman because she is pregnant or to make stereotyped assumptions about a pregnant woman’s inability to carry out certain tasks. These proscriptions undeniably opened many doors for pregnant women. But the PDA provides absolute rights only to the extent a pregnant woman is able to work at full capacity, uninterrupted by the physical effects of pregnancy, childbirth, or related medical conditions.

Moreover, to the extent that the PDA does grant the pregnant worker affirmative rights, such as a right to workplace accommodation of pregnancy’s temporary physical limitations, it does so only on a comparative basis—that is, only to the extent those rights are already provided to “similarly situated” temporarily disabled employees. An employer who fires rather than accommodates an employee because she suffers a full or partial temporary loss in capacity due to pregnancy unquestionably acts “because of” pregnancy, and yet often remains within the bounds of the law so long as non-pregnant employees with similar incapacity, in need of similar accommodation, would also be fired. In this way, the capacity-based pregnancy discrimination framework fails to account for the actual effects of pregnancy on women’s bodies and thus fails to meet the needs of many pregnant working women today, especially those who labor in hazardous jobs that require physical strength or exertion.

This Article considers the way current law treats conflicts between pregnancy and work and how pregnant working women might better navigate obstacles to their equal participation in the workplace. Part I considers the array of conflicts between pregnancy and work, illustrated both by scientific studies about the effects of work on maternal and fetal health and the situations that tend to engender pregnancy discrimination litigation. Part II describes the basic legal protections for pregnant workers: the right not to be presumed incapable, the right to work if capable, and the right, in some circumstances, to unpaid leave for pregnancy or childbirth-related disability. Finally, Part III analyzes how these sources of protection apply to different categories of pregnant workers: the fully capable, the fully incapable, and the partially capable. It discusses the substantive rights pregnant workers have when occupying each category, with an emphasis on the gaps in protection for women with partial capacity. With respect to partial capacity, we focus on the problem of access to light-duty work—temporary alternative job assignments that accommodate some of the physical effects of pregnancy. We consider typical employer policies governing light-duty assignments and the legal challenges mounted against them. We describe the limits of the current statutory framework, particularly as interpreted by some courts, for protecting pregnant workers who need light duty in order to be able to continue working. These limitations stem

from the PDA's directive that pregnant women's rights are determined primarily by reference to rights granted similarly situated workers. Finally, we propose litigation strategies that hold promise for practitioners and the pregnant women they represent. We suggest a reframing of the "similarly situated" analysis for disparate treatment challenges to light-duty policies, and explore the untapped potential of the disparate impact theory in the light-duty context.

I. PREGNANT WOMEN AND WORK

As a general matter, pregnant women are physically able to engage in paid work, just as they are able (and, indeed, need) to continue with other aspects of life. In fact, the Council on Scientific Affairs has recommended since 1984 that women without unusual complications "should be able to continue productive work until the onset of labor."⁹ However, while many women safely work at full capacity throughout pregnancy and resume work almost immediately after giving birth, pregnant women may experience conflicts between their physical condition and job requirements. Pregnancy *can* impose real, if temporary limitations on a woman's ability to perform certain work-related tasks, either in the form of physical impossibility (for example, temporarily being unable to meet a law enforcement running speed requirement), or avoidance guided by potential risk to mother or fetus (for example, a doctor's restriction on lifting heavy objects or exposure to contagions). Whether any particular pregnant woman is capable of performing some or all of her assigned tasks depends upon her particular medical condition and the nature of her job.

Scientific researchers identify three basic areas of potential conflict between work and pregnancy. First, environmental conditions may make work hazardous to some or all pregnant women, such as exposure to "hazardous chemicals, gas, dust, fumes, radiation, or infectious disease."¹⁰ Second, certain physical movements can be difficult to perform or can endanger a woman or her fetus, such as standing for long periods of time, stooping over, climbing stairs or ladders, and lifting heavy objects.¹¹ Finally, certain job conditions like irregular hours, shift work, or psychological stress can have adverse effects on

9. Council on Scientific Affairs, *Effects of Pregnancy on Work Performance*, 251 JAMA 1995, 1997 (1984).

10. *Working During Pregnancy*, U. MICH. HEALTH SYS., May 6, 2004, http://www.med.umich.edu/1libr/wha/wha_work_crs.htm; see also Fabrice Czarniecki, *The Pregnant Officer*, 3 CLINICS OCCUPATIONAL & ENVTL. MED. 641 (2003) (citing hazards to pregnant police officers, including exposure to lead through contact with bullets, noise toxicity, and chemicals).

11. See *Working During Pregnancy*, *supra* note 10; see also Mayo Clinic Staff, *Working During Pregnancy: Do's and Don'ts*, MAYOCLINIC.COM, July 6, 2007, <http://mayoclinic.com/health/pregnancy/WL00035> (recommending taking frequent breaks from standing and avoiding twisting while lifting, among other modifications).

the fetus.¹² Working the night shift, for example, appears to pose one of the biggest risks to pregnant women.¹³ The greater the number of potentially hazardous working conditions, the greater the likelihood of an adverse perinatal outcome.¹⁴ Whether any of these conflicts exist, however, is a function not only of the job itself, but of the particular woman's condition and the stage of her pregnancy.¹⁵

Not surprisingly, conflicts between pregnancy and work are more common in jobs that include some physical component. One study, for example, found evidence of increased risk of preterm delivery among electrical equipment operators, janitors, textile workers, and food service workers, compared with "markedly reduced" risk for teachers and librarians.¹⁶ Litigation over light-duty policies or other requested accommodations for pregnant workers suggest the types of jobs in which these conflicts are prevalent: firefighting, law enforcement, trucking, and ground jobs with airlines, to name just a few.¹⁷ Pregnancy also may conflict with the job duties of many physically demanding, female-dominated positions. Nurses, maids or housekeepers, cashiers, home health care aides, and waitresses all work in occupations which require heavy lifting or standing for long periods of time.¹⁸ Analysis of current data permits a

12. A study exploring the effect of ameliorating adverse conditions before a certain point in pregnancy focused on six specific occupational conditions considered hazardous for pregnant women: "night working hours, irregular or shift work, standing at least four hours daily, regularly lifting loads weighing seven kilograms or more, noise, and a moderate or high level of job strain combined with little on-the-job support." D. Hollander, *Improving Work Situations During Pregnancy May Help Improve Outcome*, 32 INT'L FAM. PLAN. PERSP. 156, 156 (2006); see also Maureen Hatch et al., *Do Standing, Lifting, Climbing, or Long Hours of Work During Pregnancy Have an Effect on Fetal Growth?*, 8 EPIDEMIOLOGY 530, 535 (1997) (confirming the finding that "a shorter work week during pregnancy appears to be advantageous for the fetus").

13. See, e.g., Claire Infante-Rivard et al., *Pregnancy Loss and Work Schedule During Pregnancy*, 4 EPIDEMIOLOGY 73, 74 (1993) (finding, based on a study of 331 pregnant women, that "women who always worked evenings or nights were at a substantially higher risk of pregnancy loss compared with women who were fixed day workers").

14. See Hollander, *supra* note 12, at 156 ("[T]he odds that an infant was small for gestational age increased steadily with the number of risky conditions present at the beginning of pregnancy; they were 30% higher among women with 4-6 conditions than among those with none.").

15. See Deborah A. Calloway, *Accommodating Pregnancy in the Workplace*, 25 STETSON L. REV. 1 (1995) (summarizing scientific research on the effects of pregnancy on women, fetuses, and job performance).

16. David A. Savitz, Andrew F. Olshan & Kelly Gallagher, *Maternal Occupation and Pregnancy Outcome*, 7 EPIDEMIOLOGY 269, 270 (1996) (studying effect of occupation on late pregnancy outcomes based on data from the National Maternal and Infant Health Survey).

17. See, e.g., *Reeves v. Swift Transp. Co.*, 446 F.3d 637 (6th Cir. 2006) (long-distance truck driver); *Urbano v. Cont'l Airlines*, 138 F.3d 204 (5th Cir. 1998) (airline ticketing agent); *Adams v. Nolan*, 962 F.2d 791, 792 (8th Cir. 1992) (police officer); *N.Y. City Transit Auth. v. State Div. of Human Rights*, 581 N.Y.S.2d 426 (App. Div. 1992) (city bus driver); Karen J. Kruger, *Pregnancy & Policing: Are They Compatible?: Pushing the Legal Limits on Behalf of Equal Employment Opportunities*, 22 WIS. WOMEN'S L.J. 61, 70-71 (2007) (describing the impact of pregnancy-related physical changes on police officer's job duties).

18. See, e.g., *EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184 (10th Cir. 2000) (certified nurse's assistant opposed seventy-five-pound lifting requirement); *Garcia v. Woman's Hosp. of Tex.*, 143 F.3d 227 (5th Cir. 1998) (licensed vocational nurse challenged 150-pound lifting requirement);

conservative estimate that close to twenty-five percent of women in the U.S. workforce hold physically strenuous jobs that may conflict with pregnancy.¹⁹

The pervasive conflicts between pregnancy and work have been compounded by two demographic shifts in recent decades. First, women have joined the workforce in unprecedented numbers. By 1975, “nearly half [of women] worked, more than [seventy] percent at full-time jobs.”²⁰ Women’s workforce participation expanded in many directions—they began to work more years of their lives and for more hours each week, with fewer interruptions. Second, since the 1970s, the number of pregnant women who work has steadily increased.²¹ Surveys also show that women are working longer into pregnancy than ever before. Of women in the 1961 to 1965 cohort of one study who worked while pregnant, almost half stopped working at least three months before childbirth, thirteen percent at least six months prior.²² In contrast, among women in the 1996 to 2000 cohort in the same study, fifty-seven percent left work less than a month before delivery and only twenty-three percent left at least two months before.²³ There is thus a marked long-term trend towards greater workforce commitment by pregnant women.

Pregnant women’s workforce patterns are not immune from the conflicts discussed above. While difficult work situations are sometimes just suffered in silence—women continue performing dangerous jobs or find ways to subtly avoid activities made impossible by their physical condition—these conflicts

EEOC v. WinCo Foods, Inc., No. 05-0486, 2006 U.S. Dist. LEXIS 64521 (E.D. Cal. Sept. 8, 2006) (grocery store clerk contested fifty-pound lifting requirement); *see also* Armstrong v. Flowers Hosp., Inc., 33 F.3d 1308, 1315-16 (11th Cir. 1994) (citing expert witness testimony, in a pregnancy discrimination case brought by a nurse, that “a pregnant employee is more susceptible to contagious diseases” and there “also exists a risk that contagious diseases communicated to the mother will harm the fetus”). Conflicts do turn up in other occupations, of course. *See, e.g.*, Randy Cohen, *Bad Yoga Pose*, N.Y. TIMES, Aug. 21, 2005, § 6 (Magazine), at 21 (considering the ethics and legality of a yoga instructor certification body’s refusal to permit pregnant women to be tested).

19. *See* CURRENT POPULATION SURVEY, BUREAU OF LABOR STATISTICS, ANNUAL AVERAGES: HOUSEHOLD DATA 217, <http://www.bls.gov/cps/cpsaat11.pdf> (last visited Mar. 3, 2009) (calculating that twenty-three percent of workers in “[p]roduction, transportation, and material moving occupations” are women); Quick Stats 2007, *supra* note 1; *see also* Calloway, *supra* note 15, at 8-9 & tbl.1 (“[T]hirty-eight percent of all working women labor in occupations where they may be unable to perform their job during pregnancy without risking their health.”).

20. ALICE KESSLER-HARRIS, *OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES* 301 (1982).

21. For women with a first pregnancy between 1961 and 1965, only sixty percent had ever worked for six or more months continuously and only forty-four percent worked during pregnancy, forty percent full time. *See* JULIA OVERTURF JOHNSON & BARBARA DOWNS, U.S. CENSUS BUREAU, *MATERNITY LEAVE AND EMPLOYMENT: PATTERNS OF FIRST-TIME MOTHERS: 1961-2000*, at 3 (2005), *available at* <http://www.census.gov/prod/2005pubs/p70-103.pdf> (reporting data from the U.S. Census Bureau’s Survey of Income and Program Participation, a nationally representative periodic survey); SMITH, DOWNS & O’CONNELL, *supra* note 2, at 3-6. For women whose first pregnancy occurred between 1996 and 2000, however, seventy-four percent of them had worked for at least six months before becoming pregnant and sixty-seven percent worked during pregnancy, fifty-seven percent fulltime. *See* JOHNSON & DOWNS, *supra*, at 3.

22. JOHNSON & DOWNS, *supra* note 21, at 6.

23. *Id.*

often have a direct impact on whether pregnant women remain in their current jobs or in the workforce at all. Two effects are worth noting here. First, pregnant women are more likely to discontinue work during pregnancy if they hold jobs that include physical components or otherwise pose challenges to safe pregnancy. For example, one study concluded that "strength requirements of the job had a significant effect on exits from work."²⁴ Second, pregnant women's workforce patterns vary significantly. Women with a college degree were also more likely to work longer into pregnancy: sixty-four percent worked within one month of childbirth, while only forty-six percent of women with less than a high school degree worked that long.²⁵ The inverse correlation between continuing to work and level of education suggests that pregnancy conflicts are particularly acute for women in so-called "blue collar" or "non-traditional" occupations, as well as for those in lower-wage, female-dominated jobs involving physical labor.²⁶ As the authors of one study suggest:

It also may be the case that jobs that require more education are more conducive to accommodating pregnant women. Women working at these jobs may be more likely to sit during the day, have easy access to rest facilities, not engage in manual labor, and not be exposed to hazardous materials or conditions. Also, their schedules may be more flexible, allowing for ease of scheduling medical appointments, late arrivals, and early departures.²⁷

Workers with the lowest earning power and the fewest job opportunities are thus also the most likely to face conflicts between pregnancy and work.

Together, these data points reinforce the need for law to take account of the physical effects of pregnancy. With more women in the workforce, more women laboring in physically demanding jobs, and more women with the economic need or desire to work more and longer during pregnancy, the potential conflicts between pregnancy and work are increasing. Yet this is where the law has focused the least.

II. THE LAW'S CURRENT RESPONSE TO PREGNANCY IN THE WORKPLACE

The twentieth century witnessed a dramatic change in the regulation of pregnancy and work. Against a long history of exclusion and protectionist policies that survived challenge, a new legal regime emerged to protect pregnant workers against discrimination beginning in the 1970s.

24. Sonalde Desai & Linda J. Waite, *Women's Employment During Pregnancy and After the First Birth: Occupational Characteristics and Work Commitment*, 56 AM. SOC. REV. 551, 560 (1991) (reporting data from the National Longitudinal Survey of Youth).

25. See JOHNSON & DOWNS, *supra* note 21, at 4 (relying on data from 1996 to 2000).

26. See *supra* text accompanying notes 16-19.

27. See JOHNSON & DOWNS, *supra* note 21, at 6.

Before the adoption of Title VII of the Civil Rights Act of 1964²⁸ and the establishment of heightened scrutiny under the Equal Protection Clause for sex-based classifications,²⁹ states and private employers could discriminate against women, whether pregnant or not, with impunity.

It remained common for employers in the 1960s and 1970s to overtly impede pregnant women's access to new or continued employment, even as women were gaining important statutory and constitutional protection against sex discrimination. Though by that time there had been a tremendous influx of women into the workforce,³⁰ many employers continued to refuse to hire pregnant women, to require them to leave before a certain point in their pregnancies, to exclude them from certain jobs, or to deny them fringe benefits like insurance, disability coverage, or leave. This differential treatment of pregnant workers somewhat surprisingly earned the Supreme Court's imprimatur twice during the 1970s, in decisions holding that neither the Equal Protection Clause³¹ nor Title VII³² prohibited discrimination on the basis of pregnancy, even though both prohibited discrimination on the basis of sex.

Three developments ushered in the modern era of pregnancy discrimination law. First, despite refusing to find an equality-based constitutional right against pregnancy discrimination, the Supreme Court in 1974 invoked the Due Process Clause to invalidate school district policies that forced pregnant teachers to leave work at a fixed point during pregnancy, regardless of their individual condition. In *Cleveland Board of Education v. LaFleur*,³³ the Court recognized the pregnant woman's right against being conclusively presumed incapable by the mere fact of pregnancy, regardless of her own individual capacity. This ruling remains good law, but its role was quickly supplanted by broader-reaching statutory protection for pregnant workers.

Constitutional rights ultimately figured only marginally in the development of rights against pregnancy discrimination. The second, and more important development, was the passage of the Pregnancy Discrimination Act in 1978

28. 42 U.S.C. §§ 2000e to 2000e-17 (2000). The Act makes it an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to . . . compensation, terms, conditions, or privileges of employment because of . . . sex." *Id.* § 2000e-2(a)(1).

29. The Supreme Court began the movement towards heightened scrutiny in *Reed v. Reed*, 404 U.S. 71 (1971), and *Frontiero v. Richardson*, 411 U.S. 677 (1973), before settling on "intermediate" scrutiny for sex-based classifications in *Craig v. Boren*, 429 U.S. 190 (1976).

30. See KESSLER-HARRIS, *supra* note 20, at 301; see also NANCY F. COTT, *THE BONDS OF WOMANHOOD* (2d ed. 1997); NAT'L RESEARCH COUNCIL, *WOMEN'S WORK, MEN'S WORK: SEX SEGREGATION ON THE JOB* (Barbara F. Reskin & Heidi I. Hartmann eds., 1986).

31. See *Geduldig v. Aiello*, 417 U.S. 484, 497 (1974).

32. See *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976).

33. 414 U.S. 632 (1974) (invalidating school district policies that forced women to stop working at a particular point in pregnancy and prevented them from starting work until a particular point after childbirth, regardless of their own capacity to work).

(PDA), designed specifically to overrule the Court's ruling in *General Electric Co. v. Gilbert*.³⁴ The *Gilbert* Court had ruled that pregnancy discrimination was not actionable under Title VII, rejecting EEOC guidelines and the rulings of every federal court of appeals to consider the question.³⁵ The PDA guarantees eligible employees two substantive rights: (1) the right not to be treated adversely because of pregnancy; and (2) the right to be treated the same as other employees "not so affected but similar in their ability or inability to work" with respect to all aspects of employment, including benefits such as leave and insurance.³⁶

The first clause of the PDA is straightforward. It simply adds "pregnancy, childbirth, or related medical conditions" to Title VII's list of protected characteristics, and thus permits pregnancy discrimination to be challenged under any available theory of liability—formal policy, disparate treatment, or disparate impact.³⁷ The proper interpretation of the PDA's second clause, however, was a matter of dispute. In the early years after the PDA's passage, feminists were divided over the proper approach. In two cases in the 1980s, they split over whether to argue that the PDA prohibited employers from treating pregnant workers more favorably than other temporarily disabled employees. One coalition argued for an "equal treatment" interpretation of the second clause, which would limit pregnant women to exactly the same rights as other temporarily disabled workers—no more, no less. Another coalition argued for an accommodation approach, which would permit employers to treat pregnant women better than other temporarily disabled workers as necessitated by the physical effects of pregnancy. The Supreme Court ultimately sided with the latter group in *California Federal Savings & Loan Ass'n v. Guerra*, ruling that, given the context in which the Act was passed, "Congress intended the PDA to be a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise."³⁸

34. 429 U.S. 125.

35. See *id.* at 149 (Brennan, J., dissenting); *Satty v. Nashville Gas Co.*, 522 F.2d 850, 854-55 (6th Cir. 1975); *Hutchison v. Lake Oswego Sch. Dist. No. 7*, 519 F.2d 961, 965 (9th Cir. 1975); *Gilbert v. Gen. Elec. Co.*, 519 F.2d 661, 667 (4th Cir. 1975), *rev'd*, 429 U.S. 125; *Tyler v. Vickery*, 517 F.2d 1089, 1097-99 (5th Cir. 1975); *Holthaus v. Compton & Sons, Inc.*, 514 F.2d 651, 653 (8th Cir. 1975); *Comm'n Workers of Am., AFL-CIO v. Am. Tel. & Tel. Co.*, 513 F.2d 1024, 1031 (2d Cir. 1975); *Wetzel v. Liberty Mut. Ins. Co.*, 511 F.2d 199, 206-07 (3d Cir. 1975), *vacated on jurisdictional grounds*, 424 U.S. 737 (1976); 29 C.F.R. § 1604.10(b) (1975) (EEOC's pregnancy discrimination guidelines, issued in 1972).

36. 42 U.S.C. § 2000e(k) (2000).

37. *Id.* ("The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions . . .").

38. 479 U.S. 272, 285 (1987) (quoting *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 758 F.2d 390 (9th Cir. 1985)). In *Cal. Fed.*, the Supreme Court considered whether a California law that required employers to provide up to four months of unpaid leave for pregnancy- or childbirth-related disability was preempted by the PDA. See *id.*

Cal. Fed. thus stands for the proposition that states can mandate—or employers can offer—protections for pregnant workers regardless of whether they do so for other temporarily disabled workers. Together, the two clauses of the PDA put an end, at least on paper, to employment policies and practices that had explicitly or implicitly barred women from working through pregnancy regardless of their individual capacity. It was these types of policies, in Congress's view, that "have long-term effects upon the careers of women and account in large part for the fact that women remain today primarily in low-paying, dead-end jobs."³⁹

The third notable development for pregnant workers was the adoption, fifteen years after the PDA's enactment, of the Family and Medical Leave Act of 1993 (FMLA), a gender-neutral law that provides eligible workers up to twelve weeks' unpaid leave per year as needed to care for a newborn or newly adopted child, to care for a seriously ill family member, or to attend to one's own serious health condition.⁴⁰ The FMLA protects pregnant women in two ways. First, a pregnant woman can take "serious health condition" leave as needed for prenatal care or if the pregnancy renders her unable to work.⁴¹ This leave can be taken intermittently if justified by medical necessity.⁴² Second, a woman can take FMLA leave as needed for childbirth and recovery, as well as to care for a newborn child.⁴³

These three components—the due process right against presumed incapacity, the PDA, and the FMLA—thus comprise federal pregnancy discrimination law.⁴⁴ Together they effected a reversal of course from an era of

39. See S. REP. NO. 95-331, at 6 (1977).

40. Pub. L. No. 103-3, 107 Stat. 6 (codified as amended at 29 U.S.C. §§ 2612-2654 (2000)). To be eligible for FMLA leave, an employee must have worked at least 1250 hours in the previous year for an employer that has at least fifty employees within a seventy-five-mile radius of where the employee reports to work. 29 U.S.C. § 2611(2).

41. 29 C.F.R. § 825.112(c) (2008) ("Circumstances may require that FMLA leave begin before the actual date of birth of a child. An expectant mother may take FMLA leave . . . before the birth of the child for prenatal care or if her condition makes her unable to work."); *id.* § 825.114(a)(2)(ii) (defining "serious health condition" to include "[a]ny period of incapacity due to pregnancy, or for prenatal care").

42. See *id.* § 825.117. An employee seeking intermittent leave must provide proof of medical necessity and must attempt to schedule the leave in a way that least disrupts the employer's business. The employer can reassign an intermittent-leave-taker to a position that is more suitable to the particular schedule. *Id.*

43. See *id.* § 825.112(a)(1) (mandating that covered employers grant leave to eligible employees "[f]or birth of a son or daughter, and to care for the newborn child").

44. Most courts have ruled the Americans with Disabilities Act inapplicable to disability arising from a normal pregnancy. See, e.g., *Gorman v. Wells Mfg. Corp.*, 209 F. Supp. 2d 970 (S.D. Iowa 2002); cf. D'Andra Millsap, Comment, *Reasonable Accommodation of Pregnancy in the Workplace: A Proposal To Amend the Pregnancy Discrimination Act*, 32 HOUS. L. REV. 1411 (1996) (urging application of the ADA to pregnancy-related disability). It is also important to note that an enormous number of workers, many of them women, are not even protected by the federal statutory framework. For example, domestic workers and individuals who work for small employers—both groups that are disproportionately female—are excluded from the PDA's protection because their employers will not

wide-ranging exclusion of pregnant women from the workforce to one in which access is all but guaranteed. These rights operate more or less effectively, however, depending on the actual work capacity of a particular woman, the nature of her job, and the policies of the employer for whom she works.

III. THE CAPACITY-BASED MODEL OF PREGNANCY DISCRIMINATION

The constitutional and statutory framework described in Part II above provides pregnant workers with important workplace rights. These rights, properly understood, all revolve around a single axis: the pregnant woman's capacity to work. We thus separate our analysis into the three possible states in which a woman may find herself in during pregnancy: full capacity to work, partial capacity to work, and little or no capacity to work. The legal regime provides differing treatment of these three phases of capacity, with its least effective aspects reserved for women with partial working capacity.

A. Full Capacity: The Right To Work

The key protection afforded by pregnancy discrimination law today is the right not to be presumed incapable of work by the mere fact of pregnancy. In other words, women have the right to be assessed individually for their ability to work. Though this right came first under the Supreme Court's due process ruling in *LaFleur*, in which the majority observed that "the ability of any particular pregnant woman to continue at work past any fixed time in her pregnancy is very much an individual matter,"⁴⁵ more workers are protected by the same right under the PDA. An employer "may not decide whether a pregnant woman can assume or continue with a particular job (that decision is left to the pregnant employee)."⁴⁶

This right against stereotyped incapacity was the central thrust of the PDA, as the statute was designed to alter the assumptions most employers held about the impact of actual and prospective reproductive behavior on women's abilities. As the Senate Committee Report explained, "the treatment of pregnant women in covered employment must focus not on their condition alone but on

meet the law's fifteen-employee minimum. Further, as discussed below, the FMLA leaves out millions of workers, such as those who work part-time and cannot meet the 1250 annual hours threshold, those who work for employers with fewer than fifty employees, and those who may be covered by the law but need more than twelve weeks' leave or who simply cannot afford to take unpaid leave at all.

45. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 645 (1974).

46. *Time v. Publix Super Market, Inc.*, 89 Empl. Prac. Dec. (CCH) 42,854 (S.D. Fla. June 6, 2007).

the actual effects of that condition on their ability to work.”⁴⁷ This right has been limited in contexts where individual assessment has been deemed impracticable, such as the airline industry,⁴⁸ but otherwise firmly enforced.

An essential corollary to the pregnant woman’s right not to be presumed incapable is the right to work if fully capable. Pregnant workers have the right under the PDA not to be singled out for adverse treatment, so long as they are capable of working on the same terms as all other fully capable workers. An employer cannot bar pregnant women from working, whether due to animosity towards them or a desire to protect them from potential hazards. The concept of pregnancy-blindness captures this right: An employer can treat the pregnant woman as well or as badly as it treats anyone else, as long as it is blind to her pregnancy as an independent variable.

Fetal protection policies, under which employers barred women from jobs that were potentially hazardous to fetal development, challenged the principle that pregnant women have the right to work if capable. In *UAW v. Johnson Controls, Inc.*,⁴⁹ however, the Supreme Court invalidated a policy that excluded pregnant or fertile women from jobs at a battery manufacturing plant that involved lead exposure. The court ruled that actual or potential risk to a woman’s fetus is not an aspect of her *capacity* to work for purposes of the bona fide occupational qualification (BFOQ) exception to Title VII’s ban on sex discrimination. The presence of fetal danger, in other words, was insufficient to make women’s sterility a BFOQ. “It is no more appropriate for the courts than it is for individual employers to decide whether a woman’s reproductive role is more important to herself and her family than her economic role. Congress has left this choice to the woman as hers to make.”⁵⁰ This ruling cemented the right of “capable” pregnant women to work on equal terms and reinforced the notion that stereotypes about pregnant women’s abilities and employers’ unilateral decisions about how best to promote maternal or fetal health are no longer permissible.

B. Limited or No Capacity: The Right To Leave Under Some Circumstances

For some women, pregnancy renders them unable to work at all or unable to perform the essential functions of a job. Imagine a woman employed in a job

47. S. REP. No. 95-331, at 4-6 (1977); see also H.R. REP. No. 95-948, at 6 (1978) (emphasizing that “mandatory leave for pregnant women arbitrarily established at a certain time during their pregnancy and not based on their inability to work” would no longer be permitted).

48. See, e.g., *Harriss v. Pan Am. World Airways, Inc.*, 649 F.2d 670, 675 (1980) (upholding forced leave policy for pregnant flight attendants because pregnant attendants are more likely than non-pregnant attendants to be impaired during an emergency due to fatigue, nausea, vomiting or miscarriage).

49. 499 U.S. 187 (1991).

50. *Id.* at 211.

that cannot be done remotely or electronically who is put on bed rest because of pregnancy complications. What rights, if any, does the law provide for her during this period?

There are two possible benefits a woman in this situation might seek: job security upon return and salary and benefits during a leave of absence. The PDA grants her an absolute right to neither of these benefits, but a comparative right to both. Under *Cal. Fed.*, employers are required to treat employees who are unable to work because of pregnancy at least as well as employees disabled due to other reasons, but "similar in their ability or inability to work."⁵¹ This principle extends to the provision of leave and other benefits. A pregnant employee could thus end up with generous leave and benefits for a pregnancy-related disability either because the employer generally accommodates all temporary disabilities well, or because the employer decides to offer leave for pregnancy-related disability even without offering similar benefits to other temporarily disabled employees. But in both cases, pregnant employees live at the whim of their employers. The PDA provides a "floor" rather than a "ceiling" on benefits for pregnant workers, but the "floor" is not absolute.⁵² An employer can be meager with its provisions for all forms of temporary disability, pregnancy included. This voluntary accommodation model exacerbates the gap between privileged and less-privileged women, since high-income jobs are more likely to come with benefits. Large law firms, for example, recently moved en masse to provide eighteen weeks of paid maternity leave for lawyers and to provide adoption leave for the first time.⁵³

Disparate impact theory might provide some protection against the harshest leave policies. It showed early promise in some of the first post-PDA cases challenging no-leave policies.⁵⁴ In the case that first divided feminists over the proper treatment of pregnancy and accommodation, the Montana Supreme

51. *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 277 n.6 (1987).

52. Compare this with Title IX, which requires some absolute accommodations for pregnant students, including student-athletes. See Deborah L. Brake, *The Invisible Pregnant Athlete and the Promise of Title IX*, 31 HARV. J.L. & GENDER 323 (2008).

53. See Amanda Bronstad, *Law Firms Across U.S. Are Boosting Paid Leave*, NAT'L L.J., Mar. 17, 2008; see also Ann O'Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 BERKELEY J. EMP. & LAB. L. 1, 8 (2007) ("Workers who benefit most from the Pregnancy Discrimination Act, in terms of ability to take medical leave related to childbirth, are women who work for employers that offer paid temporary disability leave or a generous sick leave policy to all workers. Most often, such leave is available to women in higher-paying jobs.").

54. See, for example, *Abraham v. Graphic Arts International Union*, in which the court reversed summary judgment for the employer on the validity of ten-day maximum leave policy that fell "considerably short of the period generally recognized in human experience as the respite needed to bear a child." 660 F.2d 811, 819 (D.C. Cir. 1981). The court remanded the case for a determination of the need for such a policy. *Id.* Similarly, the court in *EEOC v. Warshawsky* denied summary judgment where the policy required new employees to work for one year before eligible for sick leave. 768 F. Supp. 647, 654 (N.D. Ill. 1991) ("Because only women can get pregnant, if an employer denies adequate disability leave across the board, women will be disproportionately affected.").

Court ruled that the Miller-Wohl Company's policy of providing no leave for the first year of employment had a disparate impact on women.⁵⁵ The regulations promulgated by the EEOC concerning Title VII's interpretation endorse this approach, as well.⁵⁶ But, in the last decade, similar no-leave policies have been upheld by other courts, including appellate courts.⁵⁷ Disparate impact theory thus seems to be far from a certain source of rights, even as to the most draconian leave policies.⁵⁸

The most meaningful protection for a right to leave during periods of pregnancy-related incapacity is the FMLA, which supplements the PDA by granting eligible employees an absolute right to leave in certain circumstances.⁵⁹ If eligible for leave under the FMLA, pregnant women must be allowed to take medically necessary leave, including intermittent leave, for pregnancy-related disability. However, while the FMLA was hard-won and provides an important supplement to the PDA and other federal anti-discrimination laws,⁶⁰ it has serious gaps. Nearly forty percent of American workers are not eligible for FMLA leave,⁶¹ and many of those who are eligible cannot afford to take unpaid leave. In FMLA surveys, the most common reason employees give for not taking available leave is the inability to afford it.⁶² Moreover, of particular relevance to pregnant workers, the total leave available under the FMLA is limited to twelve weeks per year, regardless of the duration of the circumstance necessitating the leave or the occurrence of a second

55. *Miller-Wohl Co. v. Comm'r of Labor & Indus.*, 692 P.2d 1243 (Mont. 1984). Additionally, in *Maganuco v. Leyden Community High School District 212*, the Seventh Circuit affirmed summary judgment for the defendant on a disparate impact claim challenging a rule barring employees from using sick leave and maternity leave consecutively, but gave an important caveat: "This is not to say that a policy which does not provide adequate leave to accommodate the period of disability associated with pregnancy might not be vulnerable under a disparate-impact theory of liability under Title VII." 939 F.2d 440, 445 (7th Cir. 1991).

56. See 2 EEOC, EEOC COMPLIANCE MANUAL app. 626-B (1975) [hereinafter EEOC MANUAL] ("Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity." (quoting 29 C.F.R. § 1604.10(c) (1983))).

57. See *Stout v. Baxter Healthcare Corp.*, 282 F.3d 856, 861-62 (5th Cir. 2002) (upholding, against a disparate impact challenge, a policy limiting leave within the first ninety days of employment to three days); *Dormeyer v. Comerica Bank-Illinois*, 223 F.3d 579, 584 (7th Cir. 2000).

58. The EEOC, however, continues to take a more expansive view of the disparate impact theory's applicability in the pregnancy context. See EEOC MANUAL, *supra* note 56, § 626.2(a) ("Although [29 C.F.R.] § 1604.10(c) addresses the issue of adverse impact only in the context of terminations, adverse impact may also exist with regard to other policies or practices (for example, granting different benefits based on job classifications).").

59. See *supra* text accompanying notes 40-43.

60. On the history and structure of the FMLA, see Joanna L. Grossman, *Job Security Without Equality: The Family and Medical Leave Act of 1993*, 15 WASH. U. J.L. & POL'Y 17 (2004).

61. See DAVID CANTOR ET AL., BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS 3-2 to 3-3 (2000) (reporting survey results from 1995 and 2000).

62. See *id.* at 2-16 (reporting that 77.6% of those who needed leave listed this as one of the reasons for not taking leave).

covered circumstance. Thus, a woman who is forced to take FMLA leave during pregnancy because her employer will not provide any accommodations for her temporarily altered capacity, a problem discussed below, will often exhaust her total allotment, leaving nothing for childbirth, recovery, or infant care. The twelve weeks may not even be enough to get her through the remainder of pregnancy. The gaps in the FMLA are thus exacerbated by the substance of pregnancy discrimination law, which fails to provide a right to reasonable and necessary accommodation. Efforts to expand the FMLA have been frequent, but so far unsuccessful.⁶³ Leave laws in some states, however, supplement the federal protections; several have passed family and medical leave laws that are broader than the FMLA.⁶⁴

C. Partial Capacity: The Right to Necessary Accommodations?

As discussed above, the law provides one set of rights for pregnant women who have not suffered any work-related incapacity and another, more limited set, for those who are fully incapacitated. The fully capable woman is entitled to be assessed as such and to work on equal terms with other capable workers. Conversely, the FMLA's grant of unpaid leave is primarily premised on a woman's total inability to work, and, if applicable, permits temporary absence until such time as she can resume working at full capacity.

But what about the pregnant woman who is temporarily unable to perform some or all of her assigned job duties, yet wants or needs to continue working through her pregnancy? Millions of women labor in physically demanding jobs that may not be consistent with the realities of pregnancy—from doctor-imposed restrictions on heavy lifting to concerns about exposure to hazardous materials.⁶⁵ The predicament of these women reveals the most significant gap in the coverage afforded by the PDA's capacity-based model.⁶⁶ We examine

63. See, e.g., Family and Medical Leave Expansion Act, H.R. 1369, 110th Cong. (2007).

64. State laws sometimes offer longer or more frequent periods of leave, or make leave available in a greater range of situations. See NAT'L P'SHIP FOR WOMEN & FAMILIES, STATE FAMILY AND MEDICAL LEAVE LAWS THAT ARE MORE EXPANSIVE THAN THE FEDERAL FMLA, <http://www.nationalpartnership.org/site/DocServer/StatesandunpaidFMLLaws.pdf?docID=968> (last visited Mar. 3, 2009).

65. Of course, conflicts between work and pregnancy are not limited to women who perform physical labor. All pregnant women are at risk for conditions such as morning sickness that may diminish their ability to function at full capacity and lead to lateness, absenteeism, and other disruptions at work.

66. As one commentator has observed: "The message to pregnant employees is that pregnancy is perfectly acceptable, so long as their productivity does not suffer. This standard seems somewhat unreasonable given the physical demands of even the most typical pregnancies." Jessica Carvey Manners, *The Search for Mr. Troupe: The Need To Eliminate Comparison Groups in Pregnancy Discrimination Act Cases*, 66 OHIO ST. L.J. 209, 215 (2005) (citation omitted); see also Julie Manning Magid, *Pregnant with Possibility: Reexamining the Pregnancy Discrimination Act*, 38 AM. BUS. L.J. 819, 826 (2001) ("[O]nly those women who experience no illness, no changing biological requirements, and require no time to give birth to their child or recover from giving birth are protected by the PDA.").

here the problem of women in need of some work modification—colloquially, light duty—because of the physical effects of pregnancy, the legal gaps they encounter, and a solution that may hold promise for practitioners.

1. The Need for Light Duty

Consider the following scenarios:

A police officer who is approximately fourteen weeks pregnant asks her department to relieve her from patrol duties and provide a light-duty assignment for the remaining six months of her pregnancy, on the advice of her doctor. The department refuses, claiming to reserve light duty for officers injured in the line of duty. The officer's only choice is to work full duty in violation of her medical restrictions or take an unpaid leave of absence. She takes the leave. So as to have some income during this period, she uses up the eighty-four days of accrued paid vacation and sick time she had planned to use during her maternity leave. She also goes without pay for another several weeks. During her leave, she does not accrue seniority on the job. The officer and her husband also must sell their condominium because they are unable to make the mortgage payments. She uses up her FMLA leave before her baby is born.⁶⁷

A baggage handler for a major airline requests light duty when she is eight weeks pregnant, after her doctor restricts her from lifting more than twenty pounds. The airline refuses, on the grounds that it reserves light duty for workers injured on the job. Rather than disregard her doctor's orders, the baggage handler decides to take a leave of absence. As a result, she exhausts all her accrued vacation and sick time, as well as her FMLA leave. She also does not accrue pension credit during this time. She is unable to make mortgage payments and faces other financial hardships. Because she experiences complications from her C-section, she is unable to begin working full duty for several weeks. By the time she returns to her job, it has been more than a year since she has received a paycheck.⁶⁸

67. This describes the experience of Sandra Lochren, a Suffolk County, New York police officer who sued the Suffolk County Police Department (SCPD) based on its adoption of a "no light duty except for on-the-job injury" policy. See *Lochren v. County of Suffolk*, No. 01-3925, 2008 WL 2039458 (E.D.N.Y. May 9, 2008). She and five other officers successfully sued the SCPD under disparate treatment and disparate impact theories. Julia C. Mead, *Central Islip: Jury Finds Police Policy Discriminatory*, N.Y. TIMES, June 16, 2006, at B7.

68. Angie Welfare, a freight service clerk for American Airlines, is currently pursuing a pregnancy discrimination claim before the New York District Office of the U.S. Equal Employment Opportunity Commission. She is represented by Legal Momentum (formerly NOW Legal Defense and Education Fund) and attorney Deborah Karparkin. See Affidavit, *Welfare v. Am. Airlines*, Charge No. 520-2006-02955 (EEOC Aug. 14, 2006), available at <https://www.quickbase.com/up/bdy472as8/g/ri7/ebri/va/Welfare%20FINAL%20amended%20charge.doc> (Ms. Welfare's EEOC charge).

A park police officer who is less than two months pregnant receives a light duty instruction from her doctor, and requests such an assignment from her chief. Although the chief is willing to reassign the officer, county management denies the officer's request, stating that light duty only is available for officers injured on the job. As a result, the officer is forced out of work and must use up three months' worth of accrued sick, vacation, and personal leave time, followed by nine more months of unpaid leave through the end of her pregnancy and her post-childbirth recovery. During her time off work, the officer does not accrue seniority or retirement credit. She also uses up her FMLA leave.⁶⁹

These stories, drawn from recent or pending cases,⁷⁰ vividly illustrate the severe consequences for pregnant women who are unable to work at full capacity and are forced off the job. There is no dispute that pregnancy caused these women's limitations, nor is there dispute that their employers knew that these women would suffer if light duty was denied. Yet under the current PDA framework,⁷¹ these women, and others like them, still face a variety of obstacles to challenging such adverse outcomes.

69. This vignette describes the case of Tara Germain, a Suffolk County Park Police officer whose duties mirror those of officers with the police department, including making arrests and breaking up physical altercations, and who must wear a bulletproof vest and heavy gun belt. The officer is represented by attorney Janice Goodman and her case is pending in federal court. Despite the 2006 verdict in the *Lochren* case, described above, the Park Police continues to distinguish between on- and off-the-job injuries and illnesses in granting light duty. See *Germain v. County of Suffolk*, No. 07-2523 (E.D.N.Y. filed June 23, 2007).

70. Cases like the ones described above are cropping up nationwide. The ACLU of Michigan recently filed suit against the Detroit Police Department, challenging the department's light-duty policy under disparate treatment and disparate impact theories. Paul Egan & George Hunter, *5 Cops Allege Pregnancy Bias*, DETROIT NEWS, Oct. 15, 2008, at 2B. Legal Momentum, and its co-counsel the Sugar Law Center, also currently represent a firefighter in Port Huron, Michigan, who hid her pregnancy and continued working full duty until she was five months pregnant because she predicted her light-duty request would not be granted, and she feared the financial consequences of taking unpaid leave. See Affidavit, *Finn v. City of Port Huron* (EEOC Dec. 22, 2008), available at <https://www.quickbase.com/up/bdy472as8/g/m2/eb/r/va/Affidavit.pdf> (Ms. Finn's EEOC charge); see also Tova Perlmutter & Gillian Thomas, Editorial, *Port Huron Firefighter Battles for Workplace Justice for All Women*, DETROIT FREE PRESS, Jan. 28, 2009.

71. A handful of states have passed statutes mandating light duty in some circumstances. See, e.g., CAL. GOV'T CODE § 12945(b)(2) (2005) (requiring employers who have a practice of accommodating temporarily disabled employees with light-duty assignments to make such assignments available for employees with a pregnancy-related disability); CONN. GEN. STAT. § 46a-60(a)(7)(E) (2004) (defining discriminatory practices to include the failure or refusal "to make a reasonable effort to transfer a pregnant employee to any suitable temporary position which may be available in any case in which an employee gives written notice of her pregnancy to her employer and the employer or pregnant employee reasonably believes that continued employment in the position held by the pregnant employee may cause injury to the employee or fetus"); 775 ILL. COMP. STAT. 5/2-102(H) (2001 & Supp. 2008) (prohibiting employers from refusing light-duty assignments to pregnant law enforcement officers and firefighters "where that transfer can be reasonably accommodated"); TEX. GOV'T CODE ANN. § 411.0079 (Vernon 2005) (requiring "reasonable efforts to accommodate" a law enforcement officer with partial physical restriction because of pregnancy and requiring transfer to a light-duty position upon medical necessity if one is available). The public outcry following press coverage of the Detroit police officers' legal challenge prompted the introduction of similar legislation in Michigan. See Paul Egan,

There are two common policies that force pregnant women to quit or take leave during pregnancy despite not being fully incapacitated: a policy that does not make light-duty or alternative assignments available to anyone, and a policy that makes light-duty assignments available only for certain workers—typically, those injured on the job. In either case, pregnant workers are denied accommodation for temporary disability caused by pregnancy. Recent litigation suggests, however, that many employers have shifted to the latter type of policy, which may be driven, among other forces, by an employer's desire to minimize or eliminate workers' compensation liability for an injured worker.⁷²

As we explore below, different theories of discrimination available under Title VII and the PDA present unique challenges in the pregnancy context, but also, in some cases, may hold untapped potential. The challenges come in part from the existing statutory language, but also from a combination of crabbed judicial interpretations and practitioners' under-utilization of existing theories. There is no doubt that the PDA could be amended to provide more robust protection for a pregnant woman's right to work, but there is room as well to push for greater protection within the existing statutory framework.⁷³

2. *Disparate Treatment and the "Similarly Situated" Trap*

With respect to pregnancy-related disability, the PDA grants pregnant women two basic rights that are relevant to light-duty requests. The first clause of the act prevents an employer from basing any decision whether to grant or deny such a request on pregnancy itself, just as it would be impermissible to base a decision on an employee's race or national origin. A woman can thus not be denied a light-duty assignment simply because pregnancy, as opposed to any other condition or injury, occasions the request. The second clause specifically requires equal treatment with a defined comparison group—workers who are temporarily disabled by causes other than pregnancy, but "similar in their ability or inability to work."⁷⁴ In other words, the PDA grants a comparative

Work Urged for Pregnant Cops, DETROIT NEWS, June 6, 2008, available at <http://detroitnews.com/apps/pbcs.dll/article?AID=/20080606/METRO/806060360/1041/LIFESTYLE04>. The most recent version of the bill passed the Michigan House by a vote of ninety-nine to one in March 2009 and is pending in the Senate.

72. See, e.g., Federal Employee Compensation Act, 5 U.S.C. §§ 8101-8193 (2006). The act provides that federal employees injured on the job are entitled to full compensation regardless of ability to work, but must accept any "suitable work" offered. *Id.* § 8106(c).

73. See Joan C. Williams & Elizabeth S. Westfall, *Deconstructing the Maternal Wall: Strategies for Vindicating the Civil Rights of "Carers,"* 13 DUKE J. GENDER L. & POL'Y 31, 42-50 (2006).

74. 42 U.S.C. § 2000e(k) (2000). See generally Daniela M. de la Piedra, *Flirting with the PDA: Congress Must Give Birth to Accommodation Rights That Protect Pregnant Working Women*, 17 COLUM. J. GENDER & L. 275 (2008) (discussing how different courts interpret the PDA to accommodate employees experiencing temporary pregnancy-related limitations).

right of access to accommodations, like light duty, which are necessitated by the disabling effects of pregnancy.

When mounting a disparate treatment challenge to the denial of light duty by an employer with no light-duty policy, a plaintiff must show through direct or circumstantial evidence that her employer intentionally discriminated against her. Armed with evidence that pregnancy was a motivating factor for the denial, the plaintiff could proceed under the "mixed-motive" proof structure first recognized by the Supreme Court in *Price Waterhouse v. Hopkins*⁷⁵ and later codified with modifications by the Civil Rights Act of 1991.⁷⁶ Without such evidence, the court will instead apply the *McDonnell Douglas* burden-shifting approach to tease out proof of intentional discrimination.⁷⁷ Using this proof structure, a plaintiff first must make out a *prima facie* case of discrimination, showing that: (1) she is a member of a protected class; (2) she suffered an adverse employment action; (3) she was qualified for the job in question; and (4) the circumstances give rise to an inference of discrimination. The burden then shifts to the defendant "to articulate some legitimate, nondiscriminatory reason" for its action.⁷⁸ Finally, the plaintiff has the opportunity to prove that the defendant's stated reason is a pretext for discrimination.⁷⁹

In the pregnancy context, this mode of analysis tends to invite the search for a similarly-situated comparator—a temporarily disabled worker who was granted an accommodation that was denied to the pregnant worker. Finding such a person can help show a violation of the first clause—that the denial was *because of* pregnancy—or of the second clause's guarantee of a comparative right of accommodation. There are two obvious problems with this approach. First, the very structure of the statute relies on the male norm as the baseline for benefits—that is, pregnant women are guaranteed only those benefits that are *also* granted non-pregnant employees. Yet, the needs of pregnant workers are likely to differ in significant ways from the needs of workers disabled by other causes. Second, the uniqueness of the burdens, which unquestionably exist "because of" the employee's sex but do not afflict her co-workers—makes it difficult, if not impossible, to identify employees "similar in their ability or inability to work."⁸⁰ Although showing favorable treatment of a comparator is

75. 490 U.S. 228, 252 (1989) (plurality opinion).

76. 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B).

77. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

78. *Id.*

79. *Id.* at 804.

80. One commentator has suggested that an appropriate corrective would be to shift to the employer the "burden of locating an appropriate comparative," once the plaintiff has established that the "particular trait or event on which the employer is basing the action is . . . due to the pregnancy." Judith G. Greenberg, *The Pregnancy Discrimination Act: Legitimizing Discrimination Against Pregnant Women in the Workforce*, 50 ME. L. REV. 225, 252 (1998).

not the only way to prove disparate treatment under Title VII,⁸¹ courts tend to treat it as such in the pregnancy context. Without an identified comparator who received light duty, a woman's request for accommodation often is deemed a request for "special treatment," which the PDA does not expressly require. This approach makes it virtually impossible for a pregnant woman to mount a disparate treatment challenge to a facially gender-neutral policy, absent some evidence that the policy was applied selectively or otherwise unequally.⁸²

The barriers posed by the comparator model for PDA claims are demonstrated nowhere better than in *Troupe v. May Department Stores Co.*⁸³ In *Troupe*, a pregnant department store saleswoman was fired for excessive tardiness and attendance problems caused by her severe morning sickness. In affirming summary judgment on Ms. Troupe's disparate treatment claim, Judge Posner observed:

[Ms. Troupe's] lawyer argues with great vigor that she should not be blamed [for her tardiness]—that she was genuinely ill, had a doctor's excuse, etc. That would be pertinent if Troupe were arguing that the [PDA] requires an employer to treat an employee with morning sickness better than the employer would treat an employee who was equally tardy for some other health reason. This is rightly not argued. . . . [N]othing in Title VII requires [an] employer to keep [an] employee on the payroll [if she cannot work because of illness]. . . . We must imagine a hypothetical Mr. Troupe, who is as tardy as Ms. Troupe was, also because of health problems, and who is about to take a protracted sick leave growing out of those problems at an expense to Lord & Taylor equal to that of Ms. Troupe's maternity leave. If [the employer] would have fired our hypothetical Mr. Troupe, this implies that it fired Ms. Troupe not because she was pregnant but because she cost the company more than she was worth to it.⁸⁴

Pregnant plaintiffs' inability to put forward a "hypothetical Mr. Troupe" similarly has doomed disparate treatment claims by pregnant women penalized under workplace policies ranging from productivity standards⁸⁵ to rules

81. In *McDonnell Douglas*, the Court made clear that showing that a plaintiff was treated differently than a "similarly situated" co-worker was just *one* way to prove an employer's discriminatory intent, not the exclusive way. 411 U.S. at 804. Relevant evidence sufficient to show pretext includes "facts as to the [defendant's] treatment of [plaintiff] during his prior term of employment; [defendant's] reaction, if any, to [plaintiff's] legitimate civil rights activities; and [defendant's] general policy and practice with respect to minority employment," including statistics, although evidence concerning favorable treatment of similarly-situated employees would be "especially relevant." *Id.*

82. Professor Judith Greenberg has provided a comprehensive survey of this problem. Greenberg, *supra* note 80, at 240-47.

83. 20 F.3d 734 (7th Cir. 1994).

84. *Id.* at 737-38; *see also* *Dormeyer v. Comerica Bank-Illinois*, 223 F.3d 579, 583 (7th Cir. 2000).

85. *See Centeno v. Macy's Corporate Servs., Inc.*, No. 07-1199, 2008 U.S. Dist. LEXIS 49679, at *14-*15 (D.N.J. June 30, 2008) (upholding a practice where pregnant department store merchandise scanner was not excused from productivity standards absent evidence others with medical restrictions were excused from those standards).

concerning treatment of hospital patients with communicable diseases.⁸⁶ Unsurprisingly, then, disparate treatment claims arising from denial of light duty where the employer's policy does not provide such accommodation to any other temporarily incapacitated employee have met the same fate.⁸⁷

But what about cases in which the employer has a policy affording light duty to *some* employees, but restricts such assignments to those injured on the job—a definition that automatically excludes pregnancy? A strong argument can be made that such policies constitute per se disparate treatment under the PDA, because there unquestionably are workers “similar in their ability or inability to work” who receive a job benefit expressly denied to pregnant women. In this view, the second clause of the PDA *augments* the basic anti-discrimination prohibition in the first clause by dictating the appropriate comparison group. If the law is to revolve around capacity—an approach that, as outlined above, leaves many needs of pregnant working women unmet—at a minimum it should be true to its word and treat equally capable workers with equal regard. A policy that excludes pregnant women despite their potentially similar work capacity is, in effect, a formal policy of discrimination. Although this per se discrimination theory was unsuccessful in the one appellate case in which it was argued,⁸⁸ litigators should continue to insist that courts give effect to the PDA's express focus on the *extent* of capacity, and reject employers' artificial distinction concerning the *location* where the incapacity arose.

The majority of disparate treatment challenges to light-duty policies distinguishing between occupational and non-occupational injury have relied on pretext analysis using the *McDonnell Douglas* framework, with decidedly mixed results. When confronted with a putatively gender-neutral policy of granting light duty only for those workers injured at work, courts have interpreted the PDA's second clause to pregnant women's detriment, rather than to their benefit. Instead of treating capacity as the only appropriate basis for differentiation among temporarily disabled workers, they permit employers to draw other, arbitrary lines as long as the lines themselves do not precisely

86. See *Armstrong v. Flowers Hosp., Inc.*, 33 F.3d 1308, 1314 (11th Cir. 1994) (upholding firing of pregnant nurse for refusing to treat HIV-positive patient with meningitis, where she could not show other nurses also would not have been fired for refusing to perform such work).

87. See, for example, *Tysinger v. Police Department*, 463 F.3d 596, 575 (6th Cir. 2006), which upheld summary judgment for the defendant where pregnant police officer could point to no other officer who had sought light duty. The court noted that “Tysinger is not to be faulted for asserting her physician-prescribed need for restricted duty. . . . This interest [in her fetus' health] undeniably deserved and arguably even demanded *her* preferential treatment. However, the law, rightly or wrongly, does not extend this preferential obligation to the employer.” Similarly, *Dimino v. New York City Transit Authority* granted summary judgment where a pregnant officer denied restricted duty could not produce “evidence support[ing] [her] claim that she was denied a right granted to others, i.e., restricted duty.” 64 F. Supp. 2d 136, 153 (E.D.N.Y. 1999).

88. See *Reeves v. Swift Transp. Co.*, 446 F.3d 637, 641 (6th Cir. 2006) (“Swift's policy cannot be viewed as [per se or] direct evidence of discrimination because the Act merely requires employers to ‘ignore’ employee pregnancies. . . . Swift's light-duty policy is indisputably pregnancy-blind.”).

differentiate between pregnant and non-pregnant workers. This line-drawing occurs at one of two possible stages in the *McDonnell Douglas* analysis: when the plaintiff tries to establish the prima facie case, or when the employer offers a “legitimate, non-discriminatory reason” for its action. At the first stage, courts have held that a pregnant worker denied light duty under an “on-the-job injury only” policy could not satisfy the second prong of *McDonnell Douglas* because she was not “qualified” for the position itself⁸⁹ or for the benefit sought under the existing employer policy.⁹⁰ Either conclusion is question-begging at best, since both assume the validity of the underlying policy denying pregnant women light-duty assignments.

At this same stage, and even more troubling, courts have held that a pregnant worker does not satisfy the fourth prong of the prima facie case under *McDonnell Douglas*—that is, failing to show circumstances that suggest discrimination, because the plaintiff cannot point to a “similarly situated” person who was treated more favorably. Here, courts make a clear mistake, by assuming that only workers who were injured off the job are “similarly situated” to pregnant women, even though the PDA says nothing about the *source* of injury or illness when mandating the comparison to those “similar in their ability or inability to work.” This analysis nullifies the burden-shifting analysis altogether, by assuming the validity of an on-the-job/off-the-job distinction in order to ward off a challenge to it.⁹¹

Ruling against a light-duty plaintiff at the prima facie stage is a particularly damning mistake. Of course, reaching the pretext stage is the goal for any plaintiff, but particularly for a plaintiff claiming disparate treatment pursuant to a putatively neutral employer policy (as opposed to a single employment decision by a single decision maker, which is informed by numerous circumstantial variables and susceptible to individual bias). Any opportunity to introduce evidence concerning the discriminatory intent underlying the policy itself or its application in practice is crucial. Persuading a court to conduct a

89. See, for example, *Spivey v. Beverly Enterprises, Inc.*, which noted with respect to the second prong of the *McDonnell Douglas* test: “There is no dispute that Appellant was no longer qualified to work as a nurse’s assistant. The lifting restriction imposed on Appellant clearly prevented her from performing the responsibilities required of this position.” 196 F.3d 1309, 1312 (11th Cir. 1999); see also *Dormeyer*, 223 F.3d at 583.

90. See, e.g., *Urbano v. Cont’l Airlines*, 138 F.3d 204, 206 (5th Cir. 1998) (agreeing with the district court’s finding that the plaintiff failed to show she was “qualified for transfer into a light-duty position, i.e., that she sustained a work related injury” (internal quotation marks omitted)).

91. See *id.* at 208 (“As long as pregnant employees are treated the same as other employees injured off duty, the PDA does not entitle pregnant employees with non-work related infirmities to be treated the same under Continental’s light-duty policy as employees with occupational injuries.”); see also *Spivey*, 196 F.3d at 1313 (noting, with respect to the fourth prong of *McDonnell Douglas*, that the “correct comparison is between Appellant and other employees who suffer non-occupational disabilities, not between Appellant and employees who are injured on the job”).

proper “similarly situated” analysis at the prima facie stage is therefore of critical significance.

The proper analytical blueprint for prima facie analysis in light-duty cases is found in the Sixth Circuit’s opinion in *Ensley-Gaines v. Runyon*.⁹² There, the court rejected an employer’s argument that the plaintiff could not meet her prima facie burden because a policy reserving light duty for workers injured on the job did not raise an inference of differential treatment. The court ruled that it was inappropriate to limit the universe of “similarly-situated” employees to those injured off-the-job. Rather, it is *incapacity* that makes a comparator “similar” to a pregnant woman, not the location where the incapacity arose. As the court explained:

As recognized by the United States Supreme Court, “[t]he second clause [of the PDA] could not be clearer: it mandates that pregnant employees ‘shall be treated the same for all employment-related purposes’ as nonpregnant employees *similarly situated with respect to their ability to work*.” As such, the PDA explicitly alters the analysis to be applied in pregnancy discrimination cases. While Title VII generally requires that a plaintiff demonstrate that the employee who received more favorable treatment be similarly situated “in all respects,” the PDA requires only that the employee be similar in his or her “ability or inability to work.”⁹³

The court thus rejected the employer’s argument that the plaintiff had not met her prima facie burden.

Although the Fifth and Eleventh Circuits expressly refused to follow *Ensley-Gaines*, the Tenth Circuit has suggested, without expressly holding, that light-duty plaintiffs should be compared to *all* temporarily disabled employees for purposes of meeting their prima facie burden.⁹⁴ In *EEOC v. Horizon/CMS Healthcare Corp.*, the court stated:

92. 100 F.3d 1220 (6th Cir. 1996).

93. *Id.* at 1226 (citation omitted); *accord Villanueva v. Christiana Care Health Servs.*, No. 04-258, 2007 U.S. Dist. LEXIS 4760, at *14 n.4 (D. Del. Jan. 23, 2007) (finding that a pregnant patient care technician denied light duty established a prima facie case even though her medical restrictions differed from those of employees granted light duty); *Sumner v. Wayne County*, 94 F. Supp. 2d 822, 826 (E.D. Mich. 2000) (finding that a police officer fired for violating department’s no-leave policy for probationary employees after taking time off to give birth was “similarly situated” to male officer granted longer probationary period after sick leave for on-the-job injury; both were “temporarily disabled while on probation”); *see also* Jamie L. Clanton, *Toward Eradicating Pregnancy Discrimination at Work: Interpreting the PDA To “Mean What It Says,”* 86 IOWA L. REV. 703, 724-33 (2001) (explaining that reasoning of *Ensley-Gaines* is grounded in the text and legislative history of the PDA).

94. It should be noted that the “similarly situated” landscape for all employment discrimination claims recently changed with the Supreme Court’s unanimous ruling in *Sprint/United Management Co. v. Mendelsohn*, 128 S. Ct. 1140 (2008), which may broaden the universe of employees deemed “similar in their ability or inability to work” in PDA claims. In *Mendelsohn*, the Court considerably expanded the potential universe of comparators in employment discrimination claims. *Id.* at 1147 (in ADEA claim arising from company-wide reduction in force, coworkers could be appropriate comparators even if they worked outside plaintiff’s organization and/or were supervised by different managers); *see also, e.g.,*

If a plaintiff is compared only to non-pregnant employees injured off the job, her case would be “short circuited” at the prima facie stage . . . The better approach would be to hold that a plaintiff has satisfied the fourth element of her prima facie case by showing that she was treated differently than a non-pregnant, temporarily disabled employee.⁹⁵

In *Horizon/CMS*, the court went on to find genuine issues of material fact as to whether the employer had adopted the policy with the express purpose of denying light duty to pregnant women, in part because the employer could produce no evidence in support of its stated rationale for adopting the policy: cost savings.⁹⁶ Additionally, the plaintiffs in at least one recent case successfully convinced a jury that the on-the-job restriction was a pretext for discrimination against pregnant law enforcement officers.⁹⁷

Even if courts permit plaintiffs to advance to the pretext stage when challenging restrictive light-duty policies, however, the plaintiffs still face an uphill battle. At this stage, courts re-invoke the line-drawing error described above by treating a light-duty policy with an on-the-job restriction as a “legitimate, non-discriminatory reason” for denying light-duty requests by pregnant workers, which means, in effect, that the policy can only be invalidated upon a showing of pretext. Courts may apply, in essence, a presumption of legitimacy to an employment decision premised on an ostensibly “neutral” policy.

A recent Sixth Circuit case, *Reeves v. Swift Transportation Co.*,⁹⁸ illustrates this erroneous judicial response to a disparate treatment challenge. Amanda Reeves was an over-the-road truck driver for Swift. On her application for a job driving a truck, Reeves wrote that she could lift seventy-five pounds and carry that weight for fifty-six feet, and that she could lift sixty pounds over her head.

Mitchell H. Rubinstein, *Sprint/United Management Co. v. Mendelsohn: The Supreme Court Appears To Have Punted on the Admissibility of “Me Too” Evidence of Discrimination. But Did It?*, 102 NW. U. L. REV. COLLOQUY 264 (2008), <http://colloquy.law.northwestern.edu/main/2008/04/sprintunited-ma.html>.

95. 220 F.3d 1184, 1195 n.7 (10th Cir. 2000). Moreover, the court pointedly stated that comparator evidence is just one way of making out a case for disparate treatment: “Nothing in the case law in this circuit *requires* a plaintiff to compare herself to similarly-situated co-workers to satisfy the fourth element of her prima facie case. A plaintiff alleging discrimination in violation can satisfy the fourth element of her prima facie case in a number of ways.” *Id.* at 1195 n.6. In *Adams v. Nolan*, in which a pregnant police officer challenged the department’s denial of light duty, the court found that male police officers granted light duty were appropriate comparators at the pretext stage, even though they needed those assignments for a shorter term than the plaintiff requested. 962 F.2d 791, 795-96 (8th Cir. 1992) (“Plaintiff and [the male officers] were similarly situated in the critical sense that all four sought lighter work assignments than their regular patrol duties as a result of physical impairments that were unrelated to their jobs.”).

96. *Horizon/CMS*, 220 F.3d at 1198.

97. See Joanna Grossman, *A Big Win for Pregnant Police Officers: A Jury Finds a New York County’s Police Department Liable for Failing To Accommodate Pregnancy-Related Disability*, FINDLAW’S WRIT, June 27, 2006, <http://writ.news.findlaw.com/grossman/20060627.html> (describing the jury verdict in *Lochren v. County of Suffolk*, No. 01-3925, 2008 WL 2039458 (E.D.N.Y. May 9, 2008)).

98. 446 F.3d 637 (6th Cir. 2006).

She was hired, but in her first three months on the job, she never, in fact, had to unload a truck herself (or carry anything weighing seventy-five pounds). After her first three months of work, Reeves discovered she was pregnant. Her doctor wrote a note restricting her to “light work,” and indicated that she should not lift more than twenty pounds. When she showed the note to her employer, her supervisor said they had no “light work” for her to do and sent her home. The company then continued to deny her daily requests for light work, citing its policy that only on-the-job injuries merited light-duty assignments, and eventually fired her.⁹⁹

Reeves sued Swift under the PDA, advancing a disparate treatment theory. After first rejecting Reeves’s contention that the light-duty policy was per se discriminatory, the court turned to its *McDonnell Douglas* analysis. It assumed without deciding that Reeves had met her prima facie burden,¹⁰⁰ and then assessed whether she could show that Swift’s legitimate business reason for firing her—its “pregnancy blind” light-duty policy¹⁰¹—was a pretext for discrimination. Because Reeves had not introduced any evidence that Swift adopted its on- versus off-the-job policy as a way to deny pregnant women light duty,¹⁰² the court concluded that Swift was entitled to summary judgment.¹⁰³

Most circuits have not yet ruled on the validity of light-duty policies with on-the-job injury restrictions. But *Reeves* should sound a warning to litigants that in addition to vigorously advocating for a proper “similarly situated” analysis at the prima facie stage,¹⁰⁴ they also must focus their efforts on building a case of pretext. This would include an examination of how the policy came to be enacted and why—such as whether the policy was announced in close temporal proximity to an employee’s pregnancy (or cluster of employees’ pregnancies)—and how the employer justifies the policy’s business purpose. Also potentially relevant is evidence about women’s status generally within the employer’s ranks—especially among the ranks of decision makers—as well as evidence reflecting whether women are relatively new arrivals to a particular workplace or are subject to stereotyping in job assignment or other ways. To the extent permitted by the practitioner’s state’s ethics rules, extensive interviews should be conducted among current and past employees about

99. Reeves was not entitled to FMLA leave because she had worked for Swift for too few hours to be eligible. *Id.* at 638-39.

100. The court thus sidestepped *Ensley-Gaines* by limiting its comparison-group analysis to the pretext stage of the case. *Id.* at 641 n.1.

101. *Id.* at 641-42.

102. *Id.* at 642.

103. *Id.*

104. See *supra* text accompanying notes 89-97.

employer attitudes concerning pregnancy or women in the workplace and its consistency in applying the policy.¹⁰⁵

But even if plaintiffs can prevail on a showing of pretext, as a group of female law enforcement officers did in a recent case,¹⁰⁶ the conclusions reached in *Reeves* reflect a fundamental and disturbing misunderstanding about the nature of the rights guaranteed by the PDA. In *Reeves*, like prior cases from other circuits,¹⁰⁷ the court classified the plaintiff's claim as a demand for "preferential treatment." By permitting the employer to pick and choose among temporarily disabled workers, the court fundamentally misconstrues the structure of the PDA. Under such an analysis, the *employer* gets to choose the relevant comparison group on which to premise pregnant women's "neutral" treatment, as long as the choice is not animated by discriminatory intent. The PDA, however, does not delegate to employers the right to define appropriate analogues to workers temporarily disabled by pregnancy—it provides one in the statute itself: "[W]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work"¹⁰⁸ The comparative right of accommodation under the PDA is already minimal; permitting employers to undermine it, as the court did in *Reeves*, contravenes Congress' clear intent to focus on the actual effects of pregnancy on working capacity when defining discrimination.¹⁰⁹

3. *Disparate Impact: Untapped Potential*

Commentators long have expressed optimism that the disparate impact model holds potential for PDA claimants in dismantling the workplace's "latent exclusionary bias" against pregnancy.¹¹⁰ At its best, disparate impact analysis

105. See also Williams & Westfall, *supra* note 73, at 45-50.

106. See *infra* text accompanying notes 118-119 (discussing *Lochren v. Suffolk County*, No. 01-3925, 2008 WL 2039458 (E.D.N.Y. May 9, 2008)).

107. See, e.g., *Spivey v. Beverly Enters.*, 196 F.3d 1309, 1312-13 (11th Cir. 1999) ("Appellee, however, was under no obligation to extend this accommodation to pregnant employees. The PDA does not require that employers give *preferential treatment* to pregnant employees." (emphasis added)); *Urbano v. Cont'l Airlines*, 138 F.3d 204, 208 (5th Cir. 1998) ("Urbano's claim is thus not a request for relief from discrimination, but rather a demand for *preferential treatment*; it is a demand not satisfied by the PDA." (emphasis added)).

108. 42 U.S.C. § 2000e(k) (2000).

109. See *supra* text accompanying note 47.

110. Reva B. Siegel, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 YALE L.J. 929, 939 (1985); see also Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 660-65 (2001). Indeed, many advocates continue to urge even broader use of the theory, such as in cases involving breastfeeding, discrimination in the "virtual" workplace, and even assisted suicide. See Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 704 nn.12-13 (2006) (noting large number of commentators who have urged broader use of disparate impact theory).

exposes the link between policies enacted against the norm of a male worker functioning at full physical capacity and the exclusionary results when such policies are applied to the frequent, predictable, and unique event of pregnancy. Moreover, it permits plaintiffs to avoid resorting to artificial comparisons between pregnant women and those "similar in their ability or inability to work."

Dispiritingly, although the disparate impact model has been used by a handful of courts to invalidate some oppressive employer policies related to pregnancy, and although the EEOC continues to embrace it as a viable tool, courts frequently decry the model as a backdoor route to "preferential" or "special" treatment for pregnant women.¹¹¹ Of course, this characterization could not be more inaccurate; the central purpose of the disparate impact model is to remedy a neutral policy's hidden "preferential" treatment of historically *favored* groups by eliminating the "built-in headwinds"¹¹² the policy imposes upon minority groups—unless an employer can show the policy is justified by a job-related business necessity that cannot be satisfied by alternative means. Specifically, a *prima facie* case of disparate impact requires a plaintiff to (1) identify a specific employment practice having an adverse impact on a protected class and (2) provide evidence sufficient to show a causal link between the practice and the adverse impact.¹¹³ An employer must then show that the "challenged practice is job-related for the position in question and consistent with business necessity."¹¹⁴ Even if a defendant succeeds in making this showing, a plaintiff still can prevail if she can point to an alternative policy that would serve the employer's needs while avoiding the adverse impact.¹¹⁵

Although disparate impact theory has been largely ineffective in giving pregnant women access to an accommodation enjoyed by *none* of their co-workers—such as by creating an exception to an employer's absenteeism policy solely for women afflicted by pregnancy symptoms like morning

111. See, e.g., *Stout v. Baxter Healthcare Corp.*, 282 F.3d 856, 861 (5th Cir. 2002) (affirming summary judgment against plaintiff who made disparate impact challenge to her firing under employer's absenteeism policy after she took leave to recover from miscarriage); *Sussman v. Saxon*, 153 F.R.D. 689, 692 (M.D. Fla. 1994) ("This Court recognizes the Supreme Court's opinion that the Pregnancy Discrimination Act was not intended to provide accommodations to pregnant employees when such accommodations rise to the level of preferential treatment."); see also *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994) (describing disparate impact as a "permissible theory" under the PDA, but cautioning that, "properly understood," it was not a "warrant for favoritism" and could not be used to prevent employers from treating pregnant workers "as badly as they treat similarly affected but nonpregnant employees").

112. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

113. See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994-95 (1977).

114. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000).

115. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

sickness¹¹⁶—it is relatively untested in challenging light-duty policies that distinguish between occupational and non-occupational injury or illness.¹¹⁷ What case law there is on the subject suggests that such claims might encounter more success.

a. *Lochren v. County of Suffolk*: A Win for Disparate Impact

A key reason for optimism is the recent victory achieved in 2006 by a group of female police officers in Suffolk County, New York. In *Lochren*, six plaintiffs challenged the County's implementation in April of 2000 of a light-duty policy that provided such assignments only for occupational injuries. A jury ultimately returned verdicts in the plaintiffs' favor on both disparate treatment and disparate impact grounds. The plaintiffs presented evidence not only of the County's selective enforcement of the policy—namely, numerous instances in which the County had granted light-duty assignments to male officers with non-work-related injuries and illnesses—but also that, prior to the new, exclusionary policy, pregnant women had

used light duty in statistically significant higher proportions, compared to their total numbers on the force, than the overall force used sick light duty: approximately 6.1 percent of women on the nearly-2,000 officer force used light duty for pregnancy each year, by comparison, slightly over 1.2 percent of the total number of officers used light duty for other off-the-job illnesses and conditions each year.¹¹⁸

The court accepted, without discussion, that a disparate impact claim against the County's policy was appropriate, and that the harm to the women officers was statistically significant enough to withstand summary judgment.¹¹⁹ Plaintiffs ultimately went on to persuade a jury in their favor on both disparate treatment and disparate impact claims.

116. See *supra* note 57 and accompanying text; see also *Barrash v. Bowen*, 846 F.2d 927, 931 (4th Cir. 1988) (rejecting disparate impact claim because the decision to deny leave was a discretionary decision, rather than an employment practice).

117. Indeed, challenges to light-duty policies where *no* such positions are available to *any* employee have met a similar fate as claims seeking exceptions to absenteeism or no-leave policies. See *Dimino v. N.Y. City Transit Auth.*, 64 F. Supp. 2d 136, 157-58 (E.D.N.Y. 1999) ("Here, Dimino's disparate impact claim is based on the premise that the facially neutral policy of not providing restricted duty to any medically limited police officer has a disparate impact on pregnant women. The only remedy for such a problem would be either the creation of a restricted duty assignment either for all employees or for pregnant women. Both solutions would seem to violate the underlying assumption of equality over favoritism or allowance."). Notably, however, the *Dimino* court went on to observe that "disparate impact analysis might be appropriate for a more narrowly tailored policy—for instance, one that penalized internal illness more than external injury." *Id.* at 158; see also *Stout v. Baxter Healthcare Corp.*, 282 F.3d 856, 860-61 (5th Cir. 2002).

118. Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment at 11, *Lochren v. County of Suffolk*, No. 01-3925 (E.D.N.Y. Aug. 2, 2004).

119. Memorandum and Order at 5, *Lochren*, No. 01-3925 (Mar. 29, 2005).

b. Other Courts Have Left the Door Open

No court has categorically rejected the use of the disparate impact model as an appropriate vehicle for challenging an employer's light-duty policy that distinguishes between on- and off-the-job injuries and medical conditions. Indeed, the Sixth Circuit in *Reeves* signaled that disparate impact theory might be the preferable vehicle for such a challenge: "Pregnancy-blind policies of course can be tools of discrimination. . . . The legal theory Reeves has chosen—disparate treatment—requires her to allege and prove discriminatory intent."¹²⁰ Moreover, several courts have ruled expressly that the plaintiff's prima facie burden of producing evidence of a "statistically significant" adverse impact may be considerably relaxed in the light-duty context, given pregnancy's demonstrable physical effects.¹²¹ This is crucial, given the difficulty of amassing and analyzing statistical data, particularly in fields historically dominated by men, where women may comprise a small proportion of the workforce—or where the plaintiff literally might be the *only* female employee in the workplace.

The Fifth Circuit addressed this issue more than a decade ago in *Garcia v. Woman's Hospital of Texas* (*Garcia I*)¹²². In *Garcia I*, a nurse who had taken a brief sick leave due to pregnancy complications was told by her employer hospital that, in order to return to work, she would have to be cleared for full duty.¹²³ Because Ms. Garcia's doctor had issued a restriction that she could not "push, pull, lift, and support over 150 lbs," and because the hospital also had a policy of restricting sick leave to six months (which would run out prior to Ms. Garcia's due date), the hospital discharged her.¹²⁴ At trial, the court granted the hospital's Rule 50 motion on disparate treatment grounds, but did not consider the disparate impact theory.¹²⁵

On appeal, the Fifth Circuit ruled that Ms. Garcia should have been given the opportunity to present evidence that the 150-pound lifting restriction imposed on her had a discriminatory disparate impact on pregnant women. In doing so,

120. *Reeves v. Swift Transp. Co.*, 446 F.3d 637, 641-42 (6th Cir. 2006).

121. See cases cited *infra* notes 127-128. Two courts have dismissed disparate impact challenges on the grounds that the plaintiff presented insufficient statistical evidence. See *Spivey v. Beverly Enters.*, 196 F.3d 1309, 1314 (11th Cir. 1999) (summary judgment granted where plaintiff, a certified nursing assistant, did not introduce any statistics showing the light duty policy's effect); *Urbano v. Cont'l Airlines*, 138 F.3d 204, 205 n.1 (5th Cir. 1998) (adopting without discussion the district court's dismissal of plaintiff airline ticket agent's claim; district court found plaintiff's statistics insufficient where court limited her evidence to policy's effect on "similarly situated" employees, that is, those injured off the job). But see *EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1196 (10th Cir. 2000) (criticizing *Urbano* as having improperly applied disparate treatment framework to disparate impact claim).

122. 97 F.3d 810 (5th Cir. 1996).

123. *Id.* at 811.

124. *Id.* at 812.

125. *Id.* at 813.

the court expressly rejected the notion that Ms. Garcia could succeed only if she could present statistics documenting the restriction's effect:

She must . . . prove causation, . . . and for this needed testimony to the effect that the 150-pound lifting requirement would cause pregnant women as a group to be forced onto unnecessary medical leave and, because of the six-month limit on medical leave, to be terminated. It would, of course, be insufficient for a claim under Title VII if Garcia were the only pregnant woman adversely affected; she must show that pregnant women as a group would be subject to this medical restriction. If all or substantially all pregnant women would be advised by their obstetrician not to lift 150 pounds, then they certainly would be disproportionately affected by this supposedly mandatory job requirement for [nurses] at the Hospital. Statistical evidence would be unnecessary if Garcia could establish this point.¹²⁶

The court thus remanded the case to the trial court so that Ms. Garcia could produce the requisite expert testimony.¹²⁷

Another court considering a disparate impact challenge to a light duty policy took an even more generous approach, requiring only a de minimis showing of adverse impact. In *Lehmuller v. Incorporated Village of Sag Harbor*,¹²⁸ the Sag Harbor Police Department's first and only woman was denied light duty after she became pregnant.¹²⁹ In ruling that Laura Lehmuller satisfied the second prong of her prima facie case, the court apparently accepted as undisputed the fact that pregnancy's biological limitations would

126. *Id.* Notably, the court reached this conclusion despite the lack of any evidence that any other employees—such as those injured on the job—were excused from the lifting requirement. For that reason, it remains the most expansive pronouncement to date about the disparate impact theory's application in the light-duty context.

127. *Id.* Unfortunately, on remand, Ms. Garcia's expert "testified that she could not accept the potential legal liability associated with saying that any woman could lift 150 pounds, whether pregnant or not." *Garcia v. Woman's Hosp. of Tex. (Garcia II)*, 143 F.3d 227, 231 (5th Cir. 1998). Despite this idiosyncratic result in Ms. Garcia's specific case, however, the Fifth Circuit's pronouncement about the necessary evidentiary showing for a PDA disparate impact challenge remains sound. *See, e.g., Stout v. Baxter Healthcare Corp.*, 282 F.3d 856, 860-61 (5th Cir. 2002) (holding, despite rejecting plaintiff's disparate impact claim for exception to absenteeism rules, that a lifting restriction would be appropriate for disparate impact challenge, as directed by *Garcia I*); *cf. Urbano v. Cont'l Airlines*, 138 F.3d 204, 205 n.1 (5th Cir. 1998) (concluding without discussion that the district court properly granted summary judgment on plaintiff-airline ticket agent's disparate impact claim). It should be noted that the *Urbano* court's disparate impact analysis has been criticized for improperly conflating the "similarly situated" analysis of a disparate treatment claim with the disparate impact model. *See EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1196 (10th Cir. 2000) ("For this reason alone, *Urbano* is unpersuasive.").

128. 944 F. Supp. 1087 (E.D.N.Y. 1996).

129. *Id.* at 1089-90. As a result of the Department's denial of light duty, Ms. Lehmuller continued working her normal patrol duties until she was approximately three months pregnant, when she sustained a back injury on the job that entitled her to light duty under the Department's policy. *Id.* at 1090.

necessitate light duty for most or all pregnant police officers, without requiring any further proof of adverse impact.¹³⁰

This looser evidentiary burden in the light-duty context is consistent with courts' analyses of other disparate impact claims where women's biological difference is the reason for a policy's allegedly discriminatory effect.¹³¹ Courts, for example, have dispensed with rigorous statistical proof requirements in cases concerning a police department's exclusive use of guns with a large grip unsuited to a woman's average hand size,¹³² a fire department's physical agility test,¹³³ and an electrical company's failure to provide adequate restroom facilities for a woman worker.¹³⁴ Indeed, in *Dothard v. Rawlinson*,¹³⁵ the

130. *Id.* at 1090 ("Lehmuller has shown that the Village adopted a light-duty policy that has an adverse impact on pregnant officers."). Pleadings in the case do not reveal that the plaintiff submitted any statistical analyses or expert reports in opposition to the Department's summary judgment motion, appearing to confirm that the court relied on Lehmuller's experience as well as settled facts concerning pregnancy's physical effects.

131. One commentator recently noted other potential sources of support for this position, drawn from contexts other than employment. See de la Piedra, *supra* note 74, at 286, which cited *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and *United States v. Virginia*, 518 U.S. 515 (1996), as indicating the "Supreme Court's recognition of inherent [biological and reproductive] differences between the sexes that should allow for, if not mandate, the legal provision of accommodations to pregnant employees."

132. *E.g.*, *Pumphrey v. City of Coeur D'Alene*, No. 92-36748, 1994 U.S. App. LEXIS 3892 (9th Cir. Feb. 24, 1994). *Pumphrey* relied on the plaintiff's expert witness testimony and "common sense" to conclude that "this facially neutral practice would have a significantly discriminatory impact upon women, whose hands on average are smaller than men's [hands]." *Id.* at *3. The court expressly rejected the defendant city's contention that because only three women patrol officers worked on its police force, the plaintiff could not make the requisite statistical showing. "Statistics are . . . only one factor that may assist a plaintiff in establishing a discriminatory impact case. Therefore, a plaintiff is not precluded from making a prima facie case on the basis of other evidence. Plaintiff in this case has done so by showing she was terminated because she failed to meet a facially neutral requirement that could be expected to have a disparate impact on women because of an identifiable physical difference." *Id.* at *4-*5 (citations omitted).

133. *Pietras v. Bd. of Fire Comm'rs*, 180 F.3d 468 (2d Cir. 1999). In affirming the judgment in favor of a woman applicant, the court concluded that pass rate statistics drawn from sample of seven women test-takers, coupled with expert witness testimony about the test's deficiencies, "comfortably tip[] the scales in favor of the district court's finding of disparate impact." *Id.* at 475.

134. *DeClue v. Cent. Ill. Light Co.*, 223 F.3d 434 (7th Cir. 2000). In *DeClue*, Judge Posner rejected the claim of a female lineman that her employer's failure to provide restroom facilities on a worksite constituted sexual harassment. 223 F.3d at 436. However, he explained in dicta that the failure to provide restroom facilities on a construction site plainly had a disparate impact on women, by virtue of accepted, widely-held societal attitudes concerning acceptable feminine behavior.

[I]nsofar as absence of restroom facilities deters women (normal women, not merely women who are abnormally sensitive) but not men from seeking or holding a particular type of job, and insofar as those facilities can be made available to the employees without undue burden to the employer, the absence may violate Title VII. We need hardly add that women are not "unreasonable" to be more sensitive about urinating in public than men; it is as neutral a fact about American women, even though it is a social or psychological rather than physical fact, as the fact that women's upper-body strength is on average less than that of men, which has been held in disparate-impact litigation to require changes in job requirements in certain traditionally male job categories.

Id. (citations omitted); accord *James v. Nat'l R.R. Passenger Corp.*, No. 02-3915, 2005 WL 6182322, at *4-*5 (S.D.N.Y. Mar. 30, 2005) (upholding the jury verdict for a lone female machine operator on a twelve-person "work gang" who alleged that the unisex bathroom facility had a disparate impact on her; although statistics may be needed to show disparate impact "where the impact of the prohibited conduct

seminal disparate impact case concerning physical difference, the Supreme Court found that a disparate impact challenge to a prison's height and weight requirements for guards could be premised on "generalized national statistics" about male and female bodies.¹³⁶

Given the foregoing authority, practitioners are well-advised to utilize the wealth of statistics about the number of women who can be expected to become pregnant during their working lives—often more than once—as well as the extensive literature concerning pregnancy's physical effects.¹³⁷ Indeed, the disparate impact theory is especially well-suited to PDA challenges in the male-dominated work environment, where employer policies were undeniably constructed without any thought as to their impact upon pregnant women because, simply put, there were no women there to think about. When challenging light duty policies distinguishing between occupational and non-occupational injury and illness, it should be noted that, not only do women face the predictable medical event of pregnancy, they also are equally at risk for the "off-the-job" medical conditions that their male colleagues face—from car accidents to cancer. Put differently, to the extent that women are forced to exhaust all of their sick, vacation, and/or FMLA time because they are not permitted to continue working during pregnancy, they are in a worse position to weather any other off-the-job period than their male colleagues, who might have the cushion of paid sick or vacation leave, or the guaranteed twelve weeks of unpaid leave afforded by the FMLA. Further, women forced off the job due to pregnancy also face the very real possibility that they will exhaust their twelve weeks of FMLA benefits before even giving birth—making them vulnerable to discharge for absenteeism while still pregnant.

Even if plaintiffs clearly satisfy the *prima facie* requirement in these cases, it is unclear how they will fare at the next stage: business necessity analysis. Upon a proper statistical showing, the burden of proof shifts to the employer to prove that its policy bears a "manifest relationship to the employment in

is diffuse, widespread or otherwise difficult to detect," statistics were not needed where jury could reasonably conclude that women had a greater need for privacy and were more affected by unsanitary conditions, such as feces-smeared toilet seats); *see also* *Lynch v. Freeman*, 817 F.2d 380, 387-89 (6th Cir. 1987) (reversing judgment for the employer on a female construction worker's claim of inadequate restroom facilities; confirming that "the plaintiff was not required to prove her case by statistics," and that disparate impact caused by "[a]natomical differences" was remediable under Title VII).

135. 433 U.S. 321 (1977).

136. *Id.* at 330. Of course, *Dothard* is a double-edged sword for practitioners challenging physical requirements in a male-dominated work environment. The Court went on to conclude that sex was an appropriate basis for excluding women from "contact" positions in the facility, based on generalized notions of male prisoners' propensity for violence against women and women guards' ability to defend themselves. *Id.* at 335.

137. *See supra* Part I.

question” and is a “business necessity.”¹³⁸ Most likely, cost will be at least one stated rationale offered by many employers, but that justification, standing alone, generally is not sufficient under Title VII.¹³⁹ Indeed, to the extent that the employer must replace the absent pregnant worker with a temporary employee or farm her duties out to her co-workers, there is the very real possibility that the employer’s costs will increase, such as through the obligation to pay overtime to overburdened workers.¹⁴⁰ When cost justifications are raised, employers should be required to produce evidence of the cost savings achieved by denying light duty to pregnant women. Failure to do so also may be used against them as evidence of pretext.¹⁴¹

Employers may also object to the feasibility of providing light-duty work for all temporarily disabled employees on the grounds that there simply is not enough “real” work to go around, and that they will be forced to create “make-work” assignments.¹⁴² However, countless employers nationwide have avoided this problem through a variety of means. All workplaces, even physically strenuous ones, have tasks that are consistent with various physical limitations. Effective, nondiscriminatory policies contain specific examples of the kinds of tasks that fall under the light-duty rubric; in this way, employers are encouraged to be proactive in identifying a universe of suitable, productive tasks and in keeping a record of their availability.¹⁴³ Human resources

138. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 997-98 (1988). Practitioners are well-advised not to permit employers to conflate these two criteria; a policy may be *related* to the job in question, but not *necessary* to the business.

139. See *Robinson v. Lorillard Corp.*, 444 F.2d 791, 799 n.8 (4th Cir. 1971) (“While considerations of economy and efficiency will often be relevant to determining the existence of business necessity, dollar cost alone is not determinative.”).

140. Indeed, the plaintiffs in *Lochren* put forward evidence of increased overtime costs in rebutting Suffolk County’s cost-cutting defense. See Plaintiffs’ Memorandum of Law, *supra* note 118, at 14.

141. See *Watson*, 487 U.S. at 998 (although “cost or other burdens” of alternative policy is relevant to deciding whether it is equally effective to disputed policy, “[t]he same factors would also be relevant in determining whether the challenged practice has operated as the functional equivalent of a pretext for discriminatory treatment”). In *EEOC v. Horizon/CMS Healthcare Corp.*, the court denied summary judgment to the employer on a pregnancy discrimination claim based in part on its failure conduct a “formalized study of the cost savings purportedly associated with” its policy, its failure to “articulate the economic factors justifying the” policy, its inability to “explain how the [p]olicy reduced workers’ compensation costs,” and its “lack of inquiry into the costs and/or cost savings of extending the . . . [p]olicy to include employees injured off the job” as factors supporting pretext finding. 220 F.3d 1184, 1198 (10th Cir. 2000).

142. Of course, as this Article makes clear, pregnant women are not analogous to individuals who became sick or were injured off the job; consequently, it is possible to advocate that an employer’s policy be amended merely to extend the light-duty policy only to pregnant women—not *all* temporarily disabled employees. Such a policy would be perfectly legal under *Cal. Fed.*, as long as the eligibility for alternate duty is tied to the actual period of physical disability. See *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272 (1987).

143. In a model light-duty policy drafted by the International Association of Chiefs of Police, for example, the policy lists several potential tasks “drawn from a range of technical and administrative areas,” including report review, special projects, filing and other clerical functions, desk assignments such as booking officer or bookkeeping, and taking reports from colleagues or complaints from the public. IACP NAT’L LAW ENFORCEMENT POLICY CTR., TEMPORARY LIGHT DUTY: MODEL POLICY 2

professionals advocate maintenance of such “task banks,” and tout the many benefits to the employer—tangible and intangible—when temporarily disabled workers maintain a productive role in the workplace.¹⁴⁴ Finally, employers may contend that if light-duty positions are open to all employees, regardless of how they came to be temporarily disabled, there is increased potential for malingering. Of course, imposing a reasonable time limitation on light-duty assignments, such as one year, offers a straightforward solution to this problem.¹⁴⁵ Time limits would also free up light-duty assignments to be used serially by a larger number of employees as needed on a short-term basis. Plaintiffs can use proposals like this at the final stage of disparate impact analysis—when they have an opportunity to show that a proven “business necessity” could be accomplished in a less restrictive way at the same cost. Armed with these and other alternative approaches to light duty, plaintiffs—and, one hopes, the courts—will prompt employers to examine the various ways in which conflicts between pregnancy and employment are caused by the workplace, rather than by characteristics of particular workers, and how easily and cheaply accommodations can often be made. The potential for disparate impact theory in this context is clearly untapped.

CONCLUSION

The context in which pregnant women today face the workforce has changed considerably since the 1970s, when the law of pregnancy discrimination was first established. Title VII helped opened doors for working women, and the PDA expanded access for pregnant women specifically. But there is more work to be done. The law’s emphasis on capacity has stymied the development of legal or employer norms of accommodation. The reality is that the physical effects of pregnancy produce conflicts for working women either by making aspects of their work impossible, or by forcing them to choose between maternal and fetal health and their jobs. As increasing numbers of women enter higher paying, historically male-dominated fields involving physical labor, these conflicts will only become more widespread.

As we have shown, claims for workplace modifications, such as light-duty assignments, have met with mixed success. Disparate treatment plaintiffs often

(1996). The model policy also provides that the department’s “personnel authority shall maintain an inventory of available job assignments that may be used for temporary light duty.” *Id.*

144. See Bus. & Legal Reports, Inc., Steps for Cutting Workers’ Comp Costs (June 26, 2003) (on file with authors); Lisa Higgins, Bus. & Legal Reports, Inc., Returning from Disability with Transitional-Duty Task Banks (Sept. 9, 2002) (on file with authors).

145. The *Lochren* plaintiffs made a persuasive case for this alternative in successfully opposing Suffolk County’s motion for summary judgment on the disparate impact claim. See Plaintiffs’ Memorandum of Law, *supra* note 118, at 16.

stumble in the search for a comparator, or in the attempt to show why light-duty policies that exclude *some* non-pregnant workers nonetheless discriminate. Disparate treatment challenges to policies that restrict light duty to those injured at work often fail because courts view a policy that distinguishes based on the *location* where the injury or illness arose as pregnancy-blind, and therefore valid. Litigators must educate the courts that such an employer-created distinction violates both the letter and the spirit of the PDA and should not be accepted at face value.

The results of disparate impact challenges to light-duty policies have also been mixed, in part because courts refuse to apply genuine disparate impact analysis in the pregnancy context for fear of mandating “preferential treatment,” and in part because this theory has been insufficiently utilized by litigators. However, disparate impact doctrine is largely untested in the area of light duty. Yet, it may be precisely the right analysis for situations in which longstanding workplace structures and job definitions conflict with the genuine biological difference of pregnancy. At a minimum, the law should be structured to inspire a reevaluation of those aspects of jobs and the workplace that were built around the prototypical male worker—one whose innate abilities and capacities are not affected by reproduction.

The light-duty cases provide a concrete illustration of the Hobson’s choice faced by pregnant women in certain types of jobs—work at full capacity despite the hazards or contraindications or go on leave, often with no pay—and the failure of the law and courts to mitigate it. The law should account for the variation in the physical effects of pregnancy and the temporary, often minimal employer accommodations that would enable more pregnant women to keep their jobs and continue providing for their families.